[Bellch. 193

PLH *Commissioner's File: CH 1786/05*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:
Respondent:
Claim for:
Appeal Tribunal:
Tribunal Case Ref:
Tribunal date:
Reasons issued:

1. This appeal by the Council must be dismissed, as in my judgment there was no error of law in the decision of the Fox Court appeal tribunal on 10 January 2005 (Miss C Sadd, chairman, sitting alone) that the claimant's flat in Millbank was the dwelling occupied by him as his home for the purposes of the repeat claim for housing benefit he made in respect of it for the period from November 2003.

2. According to the facts found by the tribunal the claimant has very strong links to what it accepted was his home, having lived on the same estate for over 40 years. He has been the tenant of his present flat since 1996. Before that he had occupied a bigger flat with his father but when his father died of cancer, the Council asked him to move into his present flat which he did, and he has lived there ever since. For over seven years, from 1996 to mid-November 2003, he was awarded and paid housing benefit in respect of this flat on the basis that it was the dwelling normally occupied by him as his home. He is liable for and has paid council tax in respect of it, though the tribunal noted that at the hearing date he had not actually made payment in respect of this admitted liability since November 2003.

3. It is also material that the claimant has a sister who lives in Kent and since 1996 when their father died, he had at her suggestion taken on a part-time job near where she lives, as a cleaner for three hours in the evening, five evenings a week. The tribunal accepted his evidence that over the period from 1996 to July 2001 he would stay with her overnight for about three nights each week when doing this work, but continued to spend the majority of his time at his own flat, commuting from Victoria with an off-peak ticket

on his remaining work evenings and spending his weekends at home. In July 2001 however he was taken seriously ill with bowel problems. He went to his GP's surgery in London but found the doctor he used to be registered with had left. His sister suggested he consult a doctor near her and over the next three years he was admitted to hospital in Kent eight times, four times for investigation and four times for surgery. During this time he had to take various periods off from work to convalesce and his sister looked after him so he spent more of his time with her. At times when recovering from his operations he was unable to go back to his own flat, though the gaps were not more than a month and over the period of his illness he continued to visit his friends in London and stayed at his flat for six nights a month on average.

4. At all times the claimant remained on the electoral roll at his Millbank address, which also continued to be the address on his driving licence and where his bank statements and other correspondence were sent. On the other hand he used his sister's address in Kent in connection with his part-time job, and had re-registered there with the local GP he consulted after he became ill. He had a car which he did not use in London but kept in a garage rented from his employer near to his sister's, and his bank statements produced to the tribunal showed virtually all of his cash withdrawals and shopping were done there too. Officers of the Council who tried to visit the Millbank flat had found the claimant was not there unless the visits were notifed in advance, and he took some time to respond to the cards they left for him. Gas consumption at the flat was very low but the claimant continued to keep possessions there, including a TV which he kept licensed. He kept about 50 per cent of his clothing and some of his documents at his sister's.

5. On 19 January 2004 the Council decided to refuse the claimant any further housing benefit with effect from the previous November, on the ground that he failed to meet the essential condition that the dwelling for which he was claiming must be the one then occupied as his home. On his appeal against that decision the question for the tribunal was an essentially factual one: against the background outlined above, about which there was no serious dispute, was the Millbank flat at that time "the dwelling normally occupied as his home" within the meaning of regulation 5 of the **Housing Benefit (General) Regulations** 1987 SI. No. 1971, or not?

6. That arises because it is a condition of entitlement to housing benefit under section 130(1)(a) **Social Security Contributions and Benefits Act 1992** that the dwelling in respect of which benefit is claimed must be one in Great Britain which the

claimant "occupies as his home", section 137(2)(h) providing for regulations to prescribe the circumstances in which a person is or is not to be treated as meeting that condition.

7. By regulation 5 of the housing benefit regulations cited above, so far as material:

> **"5.-(1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home –**
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> **(a) by himself or, if he is a member of a family, by himself and his family; ...**
>
> **and shall not be treated as occupying any other dwelling as his home.**
>
> **(2) In determining whether a dwelling is the dwelling normally occupied as a person's home for the purpose of paragraph (1) regard shall be had to any other dwelling occupied by that person ... whether or not that dwelling is in Great Britain."**

8. There is also a definition in regulation 2 of "dwelling occupied as the home" which does not seem to help very much; it says that this expression

> **"means the dwelling, together with any garage, garden and outbuildings, normally occupied by the claimant as his home, including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated;".**

The succeeding provisions of regulation 5 deal with various special situations such as people being liable to make payments in respect of more than one dwelling, moving between dwellings, going into residential accommodation, and so forth. The only one of potential relevance is paragraph (8) by which:

> **"(8) ... a person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 13 weeks beginning from the first day of that absence from the home only if –**
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> **(a) he intends to return to occupy the dwelling as his home; and**
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> **(b) the part of the dwelling normally occupied by him has not been let or, as the case may be, sublet; and**
>
> **(c) the period of absence is unlikely to exceed 13 weeks."**

9. It was the Council's case before the tribunal that this was not an instance of the claimant being temporarily absent from his home: on the contrary by the time in question, the dwelling he normally occupied as his home had ceased to be his own flat and had become that of his sister, applying the main test in paragraphs 5(1) and (2).

10. The tribunal's reasons for rejecting that argument and deciding the question of fact in favour of the claimant were summarised as follows in the final three paragraphs of its statement of reasons (page 80, paragraphs 9 to 11):

> **"9. The tribunal found [the claimant] to be a credible witness and accepted his evidence, in particular the details as to the amount of time that he spent at [his flat]. It is clear that during the period October 2001 to November 2004 he spent the majority of his time at his sister's address. However, the reason for this is understandable. He was undergoing a series of operations and investigations and his sister was able to look after him better during this period of time.**
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> **10. More generally, it is clear to the Tribunal that [the claimant] regards [his flat] as his home and the centre of his existence. He has extremely strong links with the area having lived there for over 40 years. The Tribunal accepts that, as a result of taking the part-time job in Kent following his father's death, [the claimant] does have close links with Kent as identified in paragraph 3g above. However, prior to his illness, [the claimant] was spending the majority of his time at [his flat] and there are a number of factors identified in paragraph 3f above, which support his contention that [his flat] was normally occupied as his home.**
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> **11. Under Regulation 5(1), a person shall be treated as occupying as his home if he normally occupies it as his home and in coming to this decision regard shall be had to any other dwelling occupied by that person. Having weighed up all the evidence and taking into account the particular reasons why [the claimant] has spent time away from [his flat] at his sister's, the Tribunal finds that [the claimant] does normally occupy [his flat] as his home and allows the appeal."**

11. Against that decision the Council appeals on the ground that the tribunal erred in law in failing to consider and address all of the evidence put before it which, in the Council's submission, indicated that the claimant's "centre of interest lay elsewhere", namely at his sister's in Kent. Given the pattern of daily life shown by the bank statements and the keeping of his car there, the tribunal had insufficiently explained why the conclusion suggested by that evidence was not accepted. Further, its conclusion of fact that prior to the claimant's illness he had been spending the majority of his time at his Millbank flat was itself one that no reasonable tribunal could have reached: in the Council's view the evidence showed he was "merely occupying [the] dwelling at the weekend and occasionally during the week", which did not constitute spending the majority of time at that dwelling and the tribunal should not have so found.

12. In its more detailed submission in response to the legal officer's direction the Council refers to a passage in the CPAG's handbook of *Housing Benefit and Council Tax Legislation* (currently in the 18th edition, pages 208-9), identifying a person's "centre of interests" as a material factor in determining the dwelling normally occupied as his or her home for the purposes of regulation 5(1). Two authorities are cited there: a Court of Appeal decision now some 40 years old on a different provision in the Rent Acts, ***Herbert v. Byrne*** [1964] 1 WLR 519, and **R(SB) 7/86**. The Council reiterates its own

view that the evidence available in this case indicated strongly that the claimant's centre of interest did not lie at the Millbank flat any longer but at his sister's dwelling in Kent, and ought to have led to the conclusion that he had been spending very little time at his Millbank flat so that it was not occupied as his normal home. While accepting that the questions at issue were essentially matters of fact and degree and the tribunal was entitled to make a judgment based on the evidence, the Council submits that it reached a perverse decision on the facts and did not adequately address or explain why the evidence against the Millbank flat being the claimant's normal home was not accepted. Very properly, the submission makes clear that the Council does not impute any bad faith whatsoever to the claimant and that he has provided information willingly about his situation. The claimant himself simply confirms that he opposes the appeal, but makes no submissions of law.

13. I have given full consideration to the arguments by the Council but in my judgment they fall short of establishing that the tribunal fell into any error of law in the decision it gave.

14. As the Commissioner in case **CH 2521/02** pointed out, the question of whether a person is or is not to be treated as occupying a particular dwelling as his home is one to be determined as a matter of fact on the circumstances and evidence in the particular case. The prescribed test in regulation 5(1) for identifying a dwelling as the one "normally occupied" must be applied subject to and in the context of the remaining provisions of that regulation which, to the extent relevant to the particular facts, are to be used as aids in interpreting and applying the main test set out in paragraph (1) itself. Thus in a case such as this, where the starting point was an acceptance that the claimant had been normally occupying the Millbank flat as his home for many years before the immediate period at issue, I do not think it would have been right to do as the Council suggested to the tribunal and focus on paragraphs 5(1) and 5(2) alone without regard to the provisions of paragraph 5(8), which make clear that for this purpose "normal occupation" once established may be taken as continuing despite what can be quite extended periods of temporary absence.

15. By the same token I think it is a mistake to try and chop up what is essentially a single factual question, of what dwelling an individual is currently normally occupying as his or her home, into a series of individual tests for particular factors such as the "centre of interest" as the Council's submissions to me based on what is said in the commentary in the CPAG handbook appear to suggest. Again as pointed out by the Commissioner in **CH 2521/02**, that supposed test does not actually appear in either of

the two cases which seem (on a quick reading at least) to be cited as authority for it. The Court of Appeal decision in *Herbert v Byrne* was concerned with the differently worded legislation in the Rent Acts, which had an entirely different purpose: the crucial difference for the present purpose being that unlike the test in paragraph 5(1) it was not necessary to identify one dwelling as the one "normally occupied as the home" to the exclusion of another. For the Rent Acts it was enough to show what Russell L.J. described as "substantial personal occupation residential in quality" sufficient to say that the tenant was making "a home" in the premises in question: they did not have to be identified as his only home, or even his main home, in order to get statutory protection. See in particular *per* Lord Denning at pages 526 to 527, giving the example of a man with a home in the country who may also have a home in London spending a couple of nights there a week, and yet be protected in respect of it.

16. Both that case and the other decision cited, that of the Tribunal of Commissioners in **R(SB) 7/86,** are concerned with the degree of actual physical occupation necessary to get within the relevant statutory definition when taking on new accommodation for the first time: neither was concerned with having to make a choice between different possible "homes" by reference to family or other "interest" where there is an already established pattern of a person spending part of the time in each. R(SB) 7/86 was a supplementary benefit case where the relevant definition was a "normally occupied" test similar to the first part of regulation 5(1). The Commissioners held that (1) for this purpose it was not possible for a claimant to have more than one "home" at a time except where the regulations expressly so prescribed; and (2) a person who had not yet gone into actual occupation of the premises as her normal home could not qualify, even though she had already taken possession of them with the intention of doing so shortly, and would have satisfied the less stringent test in *Herbert v Byrne*.

17. I find no support in either case for the idea of a freestanding "centre of interest" test if that means anything different from a fair overall assessment of the evidence to determine where a person is truly making his or her normal home. Obviously in the case of a person who spends an increasing amount of his or her time in an apartment in the Costa Brava, continuing to pay the rent on a flat back here but using it basically only as a forwarding address and returning at intervals only to use the National Health Service while complaining about the taxation and the weather, it is easy to conclude that the flat here can no longer be regarded as the one normally occupied as the home and in that sense the "centre of interest" or perhaps more accurately, normal basic day to day existence, has shifted overseas: but that is really an expression of the

overall conclusion after looking at all the facts rather than a separate test to be applied along the way in reaching it.

18. In the present case as I say I have not been persuaded the tribunal went wrong in the way it applied the prescribed test to the facts, and I do not think it can be said it reached a perverse or unreasonable decision, either on the particular factual point criticised by the Council, or in its overall conclusion in favour of the claimant. This was I think a case where the evidence showing how and where the claimant was actually spending his time was fairly evenly balanced between his two addresses, and the result could well have gone either way. As has been emphasised many times however the decision on such questions of fact and degree is one for the tribunal of fact hearing and seeing the evidence to make; and it does not amount to an error of law enabling me to interfere with the result that another tribunal or body conscientiously applying its mind to the same facts could with equal propriety have reached a different conclusion. (Which is a fair description of what the Council did: there is no ground for criticising the way it has behaved in the matter, even though the tribunal differed in the result and under the rules it is the tribunal's decision that carries the day).

19. As to the point about the proportion of time spent at the claimant's own flat over the period before he became ill in July 2001, the tribunal's factual finding was in my judgment one it was entitled to reach, based on the claimant's own oral evidence recorded in the chairman's contemporaneous note at page 70. This was that he was away from home only about three nights a week, commuting the other nights and being generally at home at weekends. The tribunal recorded that it accepted his evidence as truthful, as it was entitled to do: given the acceptance of that evidence, I do not think that "merely occupying a dwelling at the weekend and occasionally during the week" is really a fair reflection of what the evidence showed, or that there is anything in the Council's point that the tribunal made a perverse finding about the pattern of occupation over this period. It was only of indirect relevance to the period actually in issue anyway.

20. The broader submission on the overall conclusion by reference to the "centre of interest" lying elsewhere by November 2003 has in my judgment also to be rejected. It was in my view quite permissible for the tribunal to take account of the claimant's long established normal occupation of his flat in the Millbank Estate as his home, and to regard his increased absences from that home during his long periods of illness and convalescence as understandable, and attributable to the practical necessity of his sister having to look after him over this period, rather than showing his normal occupation of his own flat as his home had come to an end. I am not sure for my part

whether a person who goes and stays with his sister for a few days a week or during convalescence is really accurately described as "occupying her dwelling" in the sense relevant for regulation 5(2) any more than a person who lives in bed and breakfast accommodation during the week while working away from home; but that is not a matter the tribunal went into, nor do I think it needed to, in view of its overall conclusion that the claimant's normal occupation of his own flat as his own home had not ceased. That was a permissible conclusion on the evidence, having regard in particular to the provisions of regulation 5(8) which show that his absences from home were not inconsistent with continuing "normal" occupation.

21. I reject the suggestion that the evidence relied on by the Council relating to the pattern of the claimant's cash withdrawals and shopping in Kent, and the keeping of his car there, was by itself so conclusive that it was perverse for the tribunal to have taken any different view of the matter than that of the Council; and in my view the statement of reasons explains adequately why the tribunal reached the conclusion it did. The fact that the evidence in favour of the claimant was found to outweigh that against him does not of course mean that anything relied on by the Council was ignored or "discounted"; there is in my judgment no reason to doubt that this evidence (which was accurately recorded in the statement of reasons at paragraph 3g) was properly weighed and taken into account by the tribunal in reaching its conclusion. It is not an error of law to omit to repeat or refer to all points in the evidence or contentions put forward on either side when explaining the reasons for the conclusion reached.

22. For those reasons, I dismiss this appeal.

(Signed)

P L Howell
Commissioner
8 June 2006